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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 650

JOSEPH SHERMAN,
PETITIONER

v.

JAMES A. HAMILTON, JR., DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled case October 30, 1961.

Citations to Opinions Below

The opinion of the District Court is reported in 194 F. Supp. 805 and is printed at p. 15 of the Record. The opinion of the Court of Appeals, printed in Appendix A hereof at p. 10, is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on October 30, 1961 (R. 35). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

Whether Section 235(a) of the Immigration and Nationality Act of 1952 66 Stat. 163, 198, 8 U.S.C. Section 1225(a) (1958) empowers an immigration officer to issue and the court to enforce a subpoena requiring an alien to appear and testify as a "witness" in an *ex parte* deportation investigation, where the alien is himself the subject of the investigatory proceedings and the defendant, at whom a deportation proceeding is directed.

Statute Involved

The statutory provisions involved are Section 235(a) of the Immigration and Nationality Act, of 1952, 66 Stat. 163, 198, 8 U.S.C. Section 1225(a) (1958):

"The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers and documents relating to the privilege of any person to enter, reenter, reside in or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer, may, in the event

of neglect or refusal to respond to a subpoena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer, produce books, papers and documents, if demanded, and testify, and any failure to obey such order of the Court may be punished by the court as a contempt thereof."

Statement

On April 11, 1961, the District Director of the Immigration and Naturalization Service, Boston, Massachusetts, caused a subpoena to be served upon petitioner, directing him to appear before an investigator of the Immigration Service on April 18, 1961 "to give testimony in connection with deportation proceeding being conducted under authority of the Immigration and Nationality Act, relating to Joseph Sherman (petitioner herein) concerning his privilege of entering, reentering, residing in or passing through the United States." (R. 5). Petitioner appeared at the *ex parte* administrative proceeding, described as "an investigation of Sherman, an alien with a view toward possible deportation". (R. 6). He answered certain preliminary questions, stating his name and address, in Newton, Massachusetts, that he was born in Poland in 1906, that neither he nor his parents, who were also born in Poland, had ever become citizens of the United States, that he was registered and finger printed as an alien under the Alien Registration Act, and that he first entered the United States at Ellis Island in 1920, with his mother, brother and sisters (R. 8-9). Thereafter, he refused to answer substantially all of the questions put to him by the investigator. These questions related in the main to whether or not he had applied for and received a passport under an assumed name in June 1937, whether he had used the passport to travel to France in

June 1937 and had it endorsed in Barcelona, Spain, on December 3, 1938 for return to the United States and whether he had returned to the United States on December 20, 1938. These dates were during the Spanish Civil War (R. 19). Petitioner's refusal to answer was initially "on advice of counsel" and ultimately "on all grounds that are available to me". (R. 10-14).

On April 24, 1961, respondent, acting under Section 235(a), filed in the district court an application to enforce the administrative subpoena (R. 3) seeking an order compelling petitioner to appear and testify before the investigator on May 16, 1961. On April 24, 1961 the district court allowed an order returnable May 1, 1961, directing appellant to appear and show cause why he should not be required to answer the questions put to him on April 18, 1961. On May 12, 1961, after hearing, the court issued its Opinion (R. 15) and Order (R. 19). In its Opinion, the court rejected the argument based on *United States* v. *Minker*, 350 U.S. 179 (1956) that Section 235(a) of the Act, dealing with "witnesses" did not authorize the Court to compel the testimony of petitioner who is the defendant in the deportation proceeding. The Order directed petitioner to appear before the investigator "to answer the questions put to him on April 18, 1961 and to answer such other and further questions as may be material to the subject matter of the investigation being conducted."

The court below affirmed the order of the District Court. It held that the restricted reading of the term "witness" in this Court's opinion in *Minker* was grounded narrowly on the conspicuous deference accorded the rights of citizens (Appendix A *infra* p. 14 R. 29) and that there was no inhibiting language in *Minker* restricting the power of a district director in a deportation proceeding, as contrasted with a denaturalization proceeding (Appendix A *infra* p. 14

R. 29). Although the court quoted Sections 236(a)[1] and 242(b)[2] of the Act which clearly distinguish between "alien" and "witness", it held that "witness" in Section 235(a) must include "alien", else these other provisions of the Act would be rendered sterile. Appendix A *infra* pp. 15-16 R. 30-31). The court also noted that in two decisions construing predecessor legislation it was held that the word witness fairly embraced potential defendants in deportation cases and the subsequent reenactment of the statute in substance was a strong indication of an intent to adopt the construction, as well as the language the former enactment (Appendix A *infra* p. 16 R. 31).

Finally, the court held that Congress intended the word "witnesses" in Section 235(a) to have varying and, indeed, opposite meanings, depending on whether the subpoena was issued in a deportation or a denaturalization proceeding; to include the person who is the subject of investigation in the former, but not in the latter type of proceeding; and thus "to embrace an alien defendant in a deportation proceeding, but not the citizen defendant in a denaturalization proceeding" (Appendix A *infra*, p. 17 R. 32).

Reasons for Granting the Writ

1. The decision of the court below is in apparent conflict with the decision of the Court of Appeals for the Ninth Circuit in *Lee Tin Mew* v. *Jones*, 268 F.2d 376 (1959). And there is a conflict in principle and result in the two

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[1] "A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine and cross-examine the *alien* or *witness*." (Italics supplied).

[2] "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the *alien* or *witness*." (Italics supplied).

decisions. In the *Lee Tin Mew* case, the District Director of the Immigration and Naturalization Service issued an administrative subpoena, directing Lee Tin Mew to appear and give testimony before an investigator of the Service, pursuant to the provisions of Section 235 of the Act. Although the subpoena did not refer to deportation proceedings, unlike the subpoena in the present case, the opinion of the Court of Appeals, and of the District Court (162 F. Supp. 812, 813 (1958)) recite that the investigator believed or suspected Lee Tin Mew of being an alien (268 F.2d 376, 379), and not a citizen and interrogated him over a wide field with questions which might have been pertinent to his status as a citizen or alien. 268 F.2d at 379. Referring to the failure of the subpoena or the order of the District Court to recite an appropriate jurisdictional foundation, the Court of Appeals reversed the order of the District Court requiring Lee Tin Mew to appear and testify before the investigator.

In a concurring opinion, Pope, Jr. wrote

> "While appellant here was not the subject of that kind of (denaturalization) investigation, he was clearly the subject of a similar investigation, namely one looking to deportation. But the policy which was the basis of the Supreme Court's decision in *Minker* is one which has to do with deportation as well as denaturalization. . . In my view, the rationale which led to the decision in *Minker* is equally controlling here. This means that Section 235(a) (Title 8 U.S.C.A. 1225(a)) does not authorize the order appealed from." (268 F.2d 376 at 380).

2. The decision of the court below is in conflict with the principle and policy of the decision of this Court in *United*

States v. *Minker*, 350 U.S. 179, (1956) and is believed to be erroneous. In *Minker*, Mr. Justice Frankfurter, writing for the Court, held that the word "witnesses" was "patently ambiguous" (at 186); that the breadth of the subpoena power sought to be exercised, the extensive delegated authority for its use, and the potentially oppressive nature of the power itself made for a restrictive reading of the word "witness" (at 187) and that Congress had carefully differentiated "between a witness who is not the subject of an investigation and the person who is" (at 189). This interpretation of "witness" was not limited to a citizen defendant in a denaturalization investigation. On the contrary, the opinion refers specifically (at 189) to Sections 236(a) and 242(b) of the Act as examples of such careful differentiation. These sections deal, respectively, with exclusion and deportation proceedings and do not in any way involve naturalization or denaturalization. Although the Court in *Minker* held that Congress had not provided with sufficient clarity that the subpoena power granted by Section 235(a) extends over persons who are the subject of denaturalization proceedings, the policy which was the basis of that decision, as Judge Pope wrote in his concurring opinion in *Lee Tin Mew* v. *Jones*, 268 F.2d 376 at 380, has to do with deportation as well as denaturalization.

The statute in other respects supports this interpretation of the word "witness". Section 242(b) of the Act is intended to provide procedural due process to the alien in a deportation proceeding before a special inquiry officer, and Sec. 291 of the Act places the burden of proof on the alien in such proceeding to show the time, place and manner of his entry into the United States. For failure to sustain such burden, the alien is presumed to be in the United States in violation of law. To construe Section 235(a) as making the alien compellable as a witness against himself in the

ex parte administrative pre-trial would, without perceptible warrant in the statute, undercut the safeguards provided by Section 242(b) and make the presumption of Section 291 unnecessary.

The court below did not follow the interpretation of the statute by this Court. It did not cite, as did this Court, sections 236(a) and 242(b) as examples of "Congress' careful differentiation between a witness who is not the subject of an investigation and the person who is" (350 U.S. at 189). Instead, it cited these Sections for the opposite construction that "it would be an exercise in futility for Congress to grant the Service authority to "interrogate, examine and cross-examine" an alien and yet withhold the subpoena power (Appendix A *infra* p. 15 R. 30). Despite the interpretation by this Court of these sections of the Act as examples of Congress' careful differentiation between an alien and a witness, the court below read the statute erroneously, we submit, as limited to the rights of citizens.

3. Clearly, the question presented is important in the administration of the Immigration and Nationality Act. While the Annual Reports of the Immigration and Naturalization Service do not reflect the number of *ex parte* administrative investigations which are conducted where the alien is interrogated with a view toward obtaining evidence from the alien himself as to his possible deportation, experience, the reported cases (See, e. g. *Quattrone v. Nicolls*, 210 F.2d 513 (C.A. 1, 1954) *cert. den.* 347 U.S. 976, *Lee Tin Mew v. Jones*, 162 F. Supp. 812 (1958)) and the Annual Reports themselves, *passim*. (See *Annual Report of Immigration and Naturalization Service*, 1958 p. 16) indicate the widespread employment of this procedure.

Quite apart from the number of such investigations, the question presented involves basic considerations of principle and policy. Mr. Justice Black in his concurring opinion

in *United States v. Minker*, 350 U.S. 159, at 191-192, referred to these *ex parte* investigations as compulsory questioning by law enforcement officers in their private chambers, out of which may come a prosecution against the "witness" for perjury or some other crime. "A purpose to subject aliens, much less citizens, to a police practice so dangerous should not be read into an act of Congress in the absence of a clear and unequivocal Congressional mandate. I think the Act relied on here by the Department of Justice should not be so read." Such investigations constitute the first step in proceedings calculated to bring about the deportation of aliens. This "involves issues basic to human liberty and happiness and in the present upheavals in the lands to which aliens may be returned, perhaps to life itself" *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50. See *Mangoang* v. *Boyd*, 205 F.2d 553, *cert. den.* 94 S. Ct. 129.

The decision of this Court in *Minker* raised the question here presented, but did not settle it. In view of its importance in the administration of the Act and its own intrinsic importance, settlement of the question is plainly in the public interest.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 4, 1962

Appendix A

United States Court of Appeals
For the First Circuit

No. 5841.

JOSEPH SHERMAN,

RESPONDENT, APPELLANT,

v.

JAMES A. HAMILTON, JR., DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

PETITIONER, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Allan R. Rosenberg for appellant.
James C. Heigham, Assistant U. S. Attorney, with whom *W. Arthur Garrity*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

October 30, 1961.

HARTIGAN, *Circuit Judge*. This is an appeal from an order of the United States District Court for the District of Massachusetts entered May 12, 1961 upon application of appellee for the enforcement of an administrative subpoena under the provisions of § 235(a) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 198, 8 U.S.C. § 1225(a) (1958).

Section 235(a) provides in its pertinent part that any immigration officer "shall have power to require by subpena the attendance and testimony of witnesses before immigration officers . . . relating to the privilege of any

person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service and to that end may invoke the aid of any court of the United States."

This case presents the question of whether [illegible] powers an immigration officer to subpoena as a "witness" an alien who is himself the subject of the investigatory proceedings and where the investigation is concededly an initiatory step to possible deportation proceedings against said alien.

On April 11, 1961 the District Director of the Immigration and Naturalization Service, Boston, Massachusetts, caused a subpoena to be served upon appellant — an alien residing in the United States — directing him to appear before an investigator of the Immigration Service on April 18, 1961. The subpoena recited that the appellant was required to attend the hearing "to give testimony in connection with deportation proceeding being conducted under authority of the Immigration and Nationality Act relating to Joseph Sherman (appellant herein) concerning his privilege of entering, reentering, residing in or passing through the United States."

Appellant appeared in response to the subpoena and after answering certain preliminary questions relating to such matters as the date and place of his birth, the date of his initial entry into the United States in 1920 and the fact that neither he nor his parents had ever become American citizens, thereafter refused to answer substantially all of the questions put to him by the investigator. In the main these questions sought to determine whether the appellant, acting under an assumed name, had left the United States in 1937, traveled to Spain, and, while still utilizing this artifice, had, thereafter, returned to the United States in 1938. When the investigator initially sought to

question him on this matter, appellant stated that: "I decline to answer on advice of counsel." Upon being asked by the investigator to indicate the specific ground upon which he based his refusal, he answered: "On all grounds that are available to me." The investigator, still attempting to crystallize the specific basis for appellant's refusal further queried: "By that do you mean that you decline also on the grounds of the Fifth Amendment?" Appellant replied: "Not necessarily. On all the grounds that are available to me." He maintained this position throughout the remainder of the questioning by use of the phrase "Same answer."

On April 24, 1961 the appellee acting under § 235(a) filed in the district court an application to enforce the administrative subpoena. This application sought an order directing appellant to appear and testify before the investigator on May 16, 1961. On April 24, 1961 the district court allowed an order returnable May 1, 1961 directing appellant to appear and show cause why he should not be required to answer the questions put to him on April 18, 1961. Following this hearing the district court issued an order directing appellant to appear before the investigator "to answer the questions put to him on April 18, 1961 and to answer such other and further questions as may be material to the subject matter of the investigation being conducted." Appellant has appealed from this order.

In this court, as below, the appellant's principal contention is based on the premise that under § 235(a) the district court was without authority to order him to appear and testify as a "witness" in an *ex parte* deportation investigation when he is the person at whom this proceeding is directed. He does not challenge the constitutionality of Congress' delegation of authority to the Service to issue administrative subpoenas of the type involved here. Rather, it is his position that in seeking to invoke the power to

subpoena "witnesses" against an actual party in interest, the power thus sought to be exercised exceeds the statutory grant and it is in this that the mischief lies. In short, he argues that only an impermissive reading of the term witness in § 235(a) would permit its scope to embrace the party whose conduct has generated the subpoena.

Appellant bottoms his argument for a restrictive reading of the term witness in § 235(a) on the decision in *United States* v. *Minker*, 350 U.S. 179 (1956). We feel that appellant's reliance on *Minker* is wholly misplaced.

In *Minker* the Supreme Court considered the provisions of § 235(a) in the context of whether this section authorized an immigration officer to subpoena as a witness a naturalized citizen who was the subject of an investigation by the Service incident to a possible prospective denaturalization proceeding under § 340(a) of the Act.

At the outset the Court conceded that the term "witness" as used in § 235(a) was patently ambiguous and that surely as a matter of pure "English usage" it might fairly be said to embrace any individual including a party who gives testimony in a proceeding. However, the Court went on to point out that a more precise assessment of the scope of this "Janus-faced word" could only be supplied by the circumstantial and statutory complex of its context from which it would derive its specific meaning and sustenance. Accordingly, after considering the entire Act the Court held that it could not say that Congress had provided with "sufficient clarity that the subpoena power granted by § 235(a) extends over persons who are the subject of denaturalization investigations." Id. 190. And, in the absence of express language to this effect, the Court was unwilling to imply this authority where the rights of a citizen were involved.

However, nothing in *Minker* invalidated the basic Congressional grant of authority to the Immigration Service

to issue administrative subpoenas in cases involving admitted aliens in deportation proceedings. Indeed, the clear thrust of the opinion unmistakably shows that there the restricted reading of the term witness was grounded narrowly on the conspicuous deference accorded the rights of citizens wherever ambiguity presents freedom of choice between competing alternatives. "In such a situation where there is doubt it must be resolved in the citizen's favor. Especially must we be sensitive to the citizen's rights where the proceeding is nonjudicial. . . ." Id. 188.

However, in assaying the correct interpretation to be attributed the term witness in the context of a deportation proceeding involving an admitted alien the foregoing considerations of policy which the Court felt gave "coherence to law and are fairly to be assumed as Congressional presuppositions" are distinctly absent here. Moreover, the Supreme Court has frequently recognized the significant distinctions to be drawn between the amplitude of Congress' constitutional power to bar and exclude aliens and that more circumscribed area of activity where the Government seeks to deprive a citizen of his citizenship. Compare, *United States* v. *Ju Toy*, 198 U.S. 253 (1905); *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), with *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922); *Baumgartner* v. *United States*, 322 U.S. 665 (1944); *Gonzales* v. *Landon*, 350 U.S. 920 (1955). Consequently, we agree with the district court that the *Minker* case cannot be read as in any wise restricting the power of a district director in a deportation proceeding as contrasted with a denaturalization hearing.

Finding no inhibiting language in *Minker*, it thus remains to determine whether we can say that Congress has provided with sufficient clarity that—as a "witness"—an alien is subject to administrative subpoena under § 235(a) in an investigatory proceeding concerning his privilege to remain

in the United States. Adopting the approach of the Supreme Court that the term "witness" is itself a wholly neutral one whose content can best be derived from its environment and previous history, we find that there are a number of factors which impel us to answer this question in the affirmative.

At the outset is is clear that unlike the denaturalization proceeding involved in *Minker* where a judicial trial is necessary, exclusion and deportation proceedings involving aliens are primarily and essentially administrative in nature.

Accordingly, in two companion sections of the Act — not specifically dealing with subpoenas — Congress has expressly authorized immigration officers to require aliens to testify in administrative hearings as to their right to remain in this country. Thus § 236(a), dealing with exclusion proceedings, provides that:

> "A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witness."

Again in § 242(b) dealing with deportation proceedings, Congress has expressly provided that:

> "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witness."

Surely, in the light of these provisions, as the district court pointed out, it would be an exercise in futility for Congress to grant the Service authority to "interrogate, examine and cross examine" an alien and yet withhold the subpoena power — a most meaningful device for accomplishing this end. To read § 235(a) as excluding the subpoena power against the alien who is the subject of an investiga-

tion would be to render sterile these other provisions of the Act.

Secondly, though the present § 235(a) was enacted in 1952 when Congress rewrote the whole body of the statutory immigration and nationality law, it had its genesis in Section 16 of the Immigration Act of 1917, 39 Stat. 874, 885 (former 8 U.S.C. § 152). This section—the immediate predecessor of § 235(a)—concerned the examination of entering aliens by the immigration service. The striking similarity of the two provisions is evident from a comparison of their pertinent words. The 1917 Act gave immigration officials "power to require by subpoena the attendance and testimony of witnesses . . . touching the right of any alien to enter, reenter, reside in or pass through the United States. . . ." The 1952 Act provides "power to require by subpoena the attendance and testimony of witnesses . . . relating to the privilege of any person to enter, reenter, reside in, or pass through the United States."

In two cases construing § 16 it was held that this section authorized the issuing of a subpoena upon an alien whose potential deportation was the subject of the investigation in connection with which the subpoena was issued. See *Loufakis* v. *United States*, 81 F.2d 966 (3 Cir. 1936); *Graham* v. *United States*, 99 F.2d 746 (9 Cir. 1938).

We believe that the fact that it has been twice held under predecessor legislation that the word "witness" fairly embraced potential deportees so as to render them subject to administrative subpoena by the Immigration Service is a weighty factor in any attempt to supply meaningful content to the ambiguities inherent in the word. It is a well settled rule of statutory interpretation that when a statute has been the subject of judicial construction and the statute is substantially reenacted, there is a strong indication of an intent to adopt the construction as well as the language of the former enactment. *Becker* v. *General Chain Co.*, 273

F. 419 (1 Cir. 1921). Cf. *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U.S. 315 (1938).

At the oral argument appellant urged that inasmuch as the term witness stands alone in § 235, it would be anomalous to accept the Government's position that the term possesses varying meanings so as to embrace an alien defendant in a deportation proceeding but not the citizen defendant in a denaturalization proceeding. However, it is not unusual for the same word to have differing connotations in the same act and surely no canon of statutory construction forecloses courts from attributing to the word the meaning which the legislature intended that it should have in each instance. As has been stated by the Supreme Court: "Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed." *Atlantic Cleaners & Dyers* v. *U. S.*, 286 U.S. 427, 433 (1932).

Surely the subject matter of an alien in a deportation case is significantly different from that of the citizen in a denaturalization case and just as surely the scope of the legislative power sought to be exercised in the former far transcends the latter.

Accordingly, we conclude that § 235(a) does empower an immigration officer to subpoena an admitted alien even though he may be the subject of an investigation by the Service looking towards his ultimate deportation.

Appellant's second contention involves a construction of the Order of the district court. As noted previously, this Order directed appellant "to answer the questions put to

him on April 18, 1961 and to answer such other and further questions as may be material to the subject matter of the investigation being conducted." Appellant fears that a literal reading of the language of the court below would foreclose him from asserting any constitutional right, or legal justification which might be available to him at the subsequent hearing under pain of contempt. As thus construed, he argues that the Order would deprive him of his rights under the Fifth Amendment. The Government, on the other hand, urges that appellant has misconstrued the true meaning and effect of the Order. It contends that instead of foreclosing any rights which might be available to appellant, the Order simply requires him to attend the hearing and either answer the questions there proffered or articulate a specific and meaningful basis for declining to answer the questions. In the alternative, the Government contends that even if the Order is construed as precluding appellant from hereafter asserting any constitutional right or other legal justification, it is not violative of his constitutional rights because the present record fails to disclose any basis upon which appellant could have predicated a claim of the privilege against self-incrimination as a basis for refusing to answer questions put to him. The Government's argument on this latter point takes the position that the relevant statute of limitations had run on the only apparent offenses to which such questions might relate—offenses involving the fraudulent acquisition or use of passports.

While the language of the Order is somewhat ambiguous, reference to the court's accompanying opinion and to the allied papers in the case (*National Foundry and Pipe Works* v. *Oconto Water Supply Co.*, 183 U.S. 216, 234 (1902), convinces us that the district judge did not intend to pass on whether the appellant might rely on claimed constitutional rights or legal justification for refusing to

answer at the subsequent hearing but simply ordered that the appellant submit himself to the investigator for questioning.[1]

Certainly, as a resident alien appellant was within the purview of the Fifth Amendment and entitled to invoke its safeguards. *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). As such no judicial order could foreclose the appellant from asserting claimed constitutional rights, otherwise available. The Government has suggested in an alternative argument that by failing to crystallize the precise basis of his refusal to answer the questions at the initial hearing, appellant has waived his rights under the Fifth Amendment. We feel that it is unnecessary to determine whether appellant unequivocally waived his right to claim his privilege—a proposition not unfree from doubt—cf. *Quinn*

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[1] The opinion of the district court which accompanied the instant order includes the following paragraph:

> "At the oral argument of this petition, counsel for respondent expressed some apprehension that an order of this Court might foreclose claimed constitutional rights of respondent. An examination of the transcript of the hearing held on April 18, 1961 indicated that respondent made no intelligent, intelligible, or otherwise identifiable claim of any particular constitutional right. Hence the fears expressed by counsel at the oral argument are premature on the record as it now stands."

It is markedly apparent that had the district court intended that its Order "foreclose claimed constitutional rights" of appellant it would scarcely have styled his counsel's fears on this point as "premature."

Reinforcing our conclusion in this regard is the following statement by the district judge at the show cause hearing referring to any order which he might issue:

> "With regard to Paragraph 6 of the application, I assume you made reference to it, any order this Court might issue, if this Court issues an order, would direct him to appear before the Immigration Service and acknowledge or specifically claim the Constitutional or other privilege available to him."

From all of the foregoing, it is evident that the intent of the Order of the district court was not to foreclose appellant from asserting any constitutional privilege which might be available to him but simply to require that appellant either testify or specify with clarity and particularity the basis upon which he registers any asserted constitutional privilege or legal justification.

U. S., 349 U.S. 155 (1954). *Emspak v. United States*, 349 U.S. 190 (1955). However, at the initial hearing appellant was a voluntary witness at least in the sense that the administrative subpoena was not compulsory. Accordingly, as appellant was under no compulsion to testify in the initial investigation, it would scarcely seem that he should be required to claim the privilege against compulsory self-incrimination or be deemed to have waived it. Cf. *Graham v. United States*, *supra*. Such a result would hardly seem consonant with the well settled policy that "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every presumption against the waiver of fundamental rights." *Glasser v. United States*, 315 U.S. 60 at 70 (1942); *Smith v. United States*, 337 U.S. 137 (1949).

A judgment will be entered affirming the order of the district court.

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In the Supreme Court of the United States

October Term, 1961

JOSEPH SHERMAN, PETITIONER

v.

JAMES A. HAMILTON, JR., DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 650

JOSEPH SHERMAN, PETITIONER

v.

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OPINIONS BELOW

The opinion of the court of appeals (R. 25-35; Pet. App. 10-20) is reported at 295 F. 2d 516. The opinion of the district court (R. 15-18) is reported at 194 F. Supp. 805.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1961 (R. 35). The petition for a writ of certiorari was filed on January 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 235(a) of the Immigration and Nationality Act of 1952 empowers an immigration officer to subpoena an alien as a witness in an administrative investigation conducted to determine whether to institute deportation proceedings against him.

STATUTE INVOLVED

Section 235(a) of the Immigration and Nationality Act of 1952, 66 Stat. 198, provides in pertinent part:

> * * * The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpoena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books,

papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

STATEMENT

In connection with the investigation of petitioner, an admitted alien, to determine his deportability, the District Director of the Immigration and Naturalization Service at Boston, Massachusetts, caused a subpoena to be served upon him under Section 235(a) of the Immigration and Nationality Act of 1952, *supra*, commanding that he appear on April 18, 1961 at the office of the Service in Boston "to give testimony in connection with deportation proceeding . . . relating to Joseph Sherman concerning his privilege of entering, reentering, residing in, or passing through the United States" (R. 5, 6).

On the date and at the place specified, petitioner appeared before Immigration and Naturalization Investigator Kinnevan and, after being again advised of the purpose of the inquiry, was sworn as a witness (R. 8). Petitioner responded to the investigator's preliminary inquiries—giving his name, his residence, and date of birth (R. 8). He further testified that he had been born in Poland, that he first entered the United States in 1920, that he had never become a citizen of the United States, and that he had registered and reported annually pursuant to the Alien Registration Act of 1940 (R. 8-9). There followed a series of inquiries, which petitioner refused to answer, relating to the issue whether, in June 1937,

he had departed from the United States and traveled to Spain with a passport obtained under an assumed name (Samuel Levine), and, while still employing this pseudonym, had reentered the United States, in 1938, without proper travel and reentry documents (R. 9-14).[1] Petitioner's refusal to respond to these questions was posited "on all the grounds" available to him.[2] The proceeding was then terminated.

On April 24, 1961, the District Director filed an application with the district court to enforce the administrative subpoena. Following a hearing, the court granted the application ordering petitioner to appear and testify before the investigator and answer all the questions that had been put to him on April 18, as well as such "further questions as may be material to the subject matter of the investigation being conducted" (R. 19; see R. 15-18). The court of appeals unanimously affirmed (R. 25-35; Pet. App. 10-20), holding that a subpoena could be issued to an alien whose deportability was the subject of investigation. The court interpreted the order of the district court as not passing on the issue whether petitioner could claim the privilege against self-incrimination

[1] The files of the Immigration and Naturalization Service contained this information as well as the sworn testimony of a witness to the effect that the person who in 1937 executed a passport application in the name of Samuel Levine was actually the petitioner (R. 6; see R. 11).

[2] Initially he refused to answer "on advice of counsel." When he was thereafter asked by the investigator whether he also relied "on the grounds of the Fifth Amendment," petitioner answered: "Not necessarily. On all the grounds that are available to me." (R. 9.)

but deciding only the right to subpoena the alien under investigation (R. 33-34; Pet. App. 18-19).

ARGUMENT

Section 235(a) of the Immigration and Nationality Act of 1952, *supra*, pp. 2-3, grants to immigration officers the right to compel by subpoena the attendance and testimony of witnesses "relating to the privilege of any person to enter, reenter, reside in, or pass through the United States." The sole question presented by this case is whether this subpoena power extends to an alien, like petitioner, whose deportability is the subject of investigation.[1] The ruling of the courts below that it does is supported by the language, history and purpose of the statute.

1. The language of Section 235(a) literally covers petitioner since he is a "person" and the testimony sought from him relates to the "privilege of any person"—the privilege of petitioner, an alien—to reside here. The language involved is not new in the 1952 Act. Section 16 of the Immigration Act of 1917, 39 Stat. 885, had conferred on immigration authorities power to subpoena any witness "touching the right of any alien to enter, reenter, reside in, or pass through the United States."[2] Under this predecessor statute, the term witness had been construed by the

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[1] Petitioner does not argue, and the case, in its present posture, does not raise any issue concerning petitioner's right to invoke his privilege against self-incrimination at the administrative inquiry (see the Statement, *supra*, pp. 4-5).

[2] The only change of relevance for present purposes was that the 1952 Act substituted the word "person" for "alien."

courts as embracing, within the subpoena power, an alien, like petitioner, who was the subject of a deportation investigation. *Graham* v. *United States*, 99 F. 2d 746, 748-749 (C.A. 9); *Loufakis* v. *United States*, 81 F. 2d 966 (C.A. 3). There is no reason to believe that, when Congress, in 1952, readopted essentially the language of Section 16 of the 1917 Act, it intended to change the judicial construction previously put on that language. See, *e.g.*, *Shapiro* v. *United States*, 335 U.S. 1, 16, and cases there cited.

2. *United States* v. *Minker*, 350 U.S. 179, is distinguishable. From 1917 to 1952, the subpoena power of immigration officers was limited to witnesses in an administrative investigation conducted to determine whether to institute deportation proceedings against an alien. In some instances, the alien himself, who was the subject of the investigation, was subpoenaed as a witness. As noted, this reading of the statute had been upheld by the courts. In 1952, Congress, by adding new language to Section 235(a), expanded the power of immigration officers to subpoena witnesses in "any manner which is material to the enforcement of this Act and the administration of the Service." The question in *Minker* was whether the subpoena power was to be extended to a citizen who was himself the subject of an investigation conducted to determine whether to institute a judicial denaturalization proceeding against him (see 350 U.S. at 181). This Court's "restrictive reading of the Janus-faced word 'witness'" (*id.* at 187) stemmed from its reluctance to permit administrative subpoena power to be applied to a prospective defendant

in a suit for the revocation of citizenship, absent a clear legislative command to that effect. The Court pointed out that denaturalization proceedings had theretofore been litigated only in a "public adversary judicial proceeding" subject to a heavy burden of proof (*id.* at 188), and reasoned that, had Congress intended such a radical departure from existing procedure, it would have done so specifically and directly and not simply by an "ambiguously worded power" (*id.* at 187). As the Court stressed, "where there is doubt it must be resolved in the citizen's favor" (*id.* at 188). Justice Black, in a concurring opinion, also avowed that Section 235(a) was concerned with "aliens and immigration, not with naturalization or denaturalization," for, although "Congress has full power to bar or exclude aliens from the country * * *, citizenship, whether acquired by birth or by naturalization, cannot be taken away without a judicial trial in which the Government carries a heavy burden" (*id.* at 193). And Justice Douglas, in another concurring opinion, agreed that Section 235(a) should be construed narrowly with respect to denaturalization proceedings, because a citizen's constitutional "safeguards would be imperiled if prior to the institution of the proceedings the citizen could be compelled to be a witness against himself and furnish out of his own mouth the evidence used to denaturalize him" (*id.* at 197).

None of the considerations on which *Minker* rests apply to the present case. The language here is not new or ambiguous; the procedure for investigating the right of aliens to remain had previously been

held to apply to an alien under investigation; the subpoena power is being applied, not to a judicial proceeding, but to matters which have always been primarily subject to administrative adjudication. The power over deportation has long been recognized as delegable by Congress to executive or administrative authority, and the rights of aliens have been and still are primarily the subject of administrative scrutiny and regulation. See, *e.g.*, *United States* v. *Ju Toy*, 198 U.S. 253, 260-261; *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210. Congress hardly intended to deprive the Service of the right, for example, to summon a sailor to determine whether he had overstayed shore leave, or a student to determine whether he was maintaining his status, without examining third parties in each case. Even with respect to persons under investigation, administrative subpoena power or other process to aid administrative adjudication, is not new either in immigration law or in other fields of administrative law. Cf. *St. Regis Paper Co.* v. *United States*, 368 U.S. 208. There is, thus, no reason why the subpoena power granted by Section 235(a) should not apply to petitioner who is admittedly an alien and whose right to remain is under investigation.

In *Lee Tin Mow* v. *Jones*, 268 F. 2d 376 (C.A. 9), relied on by petitioner (Pet. 5-6), although the subpoena purported to issue in an investigation of the alien preliminary to the institution of a deportation proceeding against him, the defendant at all times claimed he was a citizen. The subpoena did not recite that he was even suspected of being an alien, and many of the questions he refused to answer were directed to his citizenship status (see 268 F. 2d at 379).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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